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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 622

CHARLES ALVIN SOAPE and
MRS. ESTHER GATLIN SOAPE

versus

LOUISIANA POWER AND LIGHT COMPANY, ET AL

Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES
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CHARLES ALVIN SOAPE and MRS. ESTHER GATLIN SOAPE

versus

LOUISIANA POWER AND LIGHT COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Charles Alvin Soape and Mrs. Esther Gatlin Soape, Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case, bearing the docket number 22647 of said Court.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals in this case is included as Appendix "A", and is reported in 358 F. 2d 312. Judgment of the Fifth Circuit Court of Appeals was entered April 11, 1966 and appears herein as Appendix "B".

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals in Charles Alvin Soape and Mrs. Esther Gatlin Soape vs. Louisiana Power and Light Company, Et Al #22647 was entered on 11 April, 1966. The jurisdiction of this court is invoked under 28 USC Section 1254, and under the provisions of Rule 19 of the United States Supreme

Court. The judgment of the Fifth Circuit Court of Appeals is reported in 358 Fed (2) 312 on May 23, 1966. By order of this Court on July 11, 1966 an enlargement of time for filing this application for certiorari was granted until September 10, 1966.

QUESTIONS PRESENTED

1. Whether the trial Court erred in admitting into evidence the entire National Electrical Safety Code, previously held inadmissible by the Fifth Circuit, and instructing the jury that they "might consider it" in a case where said code was wholly irrelevant.

2. Whether the Court erred in refusing to give a special charge to the effect that a power company is under a *non-delegable duty* quo ad protection of the public from its high tension wires.

3. Whether the Court erred in refusing to give a special charge relative to momentary distractions made necessary by the work being done as bearing upon contributory negligence.

STATUTES OR CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process clause of the Fifth Amendment of the Constitution of the United States.

STATEMENT

Appellants, Charles A. Soape, Sr. and his wife, Mrs. Esther Gatlin Soape, appeal herein from a judgment in favor of the defendant, Louisiana Power and Light

Company based upon a jury verdict in favor of said defendant rendered in the District Court for the Eastern District of Louisiana, New Orleans Division. Plaintiffs had sued for damages for the death of their fifteen year old son, Charles Soape, Jr. who had been killed on July 24, 1957 in an electrical accident while working on a highway widening project near Hammond. The Soape boy, an employee of W. R. Core Construction Company, under orders of his superior, was engaged at the time of the accident in assisting in the removal of some large stumps on the side of the road, just off the shoulder thereof. (R. 359 and 416). The stumps were being removed by means of a large crane and young Soape was ordered to connect the steel line of the crane to the stumps so that they might be lifted up onto a truck to be carried away. The steel line or cable from the crane was attached to the stumps by means of a "U" shaped hook and clamping device known as a clevis (R. 386) and it was young Soape's job to descend off the shoulder of the highway and connect the cable or steel line around the stumps, *which were located almost directly under a high tension line of the defendant, Louisiana Power and Light Company.* (R. 416).

The fatal accident occurred when Young Soape was in process of helping to remove a huge stump from the side of the highway, almost directly beneath the high tension lines, by fastening the crane line onto the stump with the clevis or "U" shaped hooking device preparatory to lifting the stump. The crane line either touched the high tension line or came so close to it that the current "arced." (R. 359 through 362).

The entire highway widening project covered a

stretch of road several miles in length, and, prior to the highway widening most of the high tension line poles of the power company had been moved back about eight feet to accommodate the increased width of the highway. (R. 424). In the area where the accident occurred, however, *there was a stretch of seven poles which had not been moved back at all.* (R. 424). These seven unmoved poles covered a distance along the highway of approximately half a mile. (R. 436). The net result was to create a situation wherein workers on the highway, such as young Soape, *were obliged to work closer and closer to the high tension wires, as the work progressed.* Thus, at one stage, working in an area wherein the high tension poles had been moved back from the highway, the highway construction workers would have sufficient room to work without coming too close to the high tension wires but, as the line of unmoved poles slanted ever closer to the highway, they were gradually obliged to work closer and closer to the overhead, high tension wires, using cranes and other "high rise" machinery.

A principal contention of the plaintiff as to the negligence of the power company was that the power company should have moved the seven poles back from the highway just as it had moved back the numerous other poles throughout the construction project. It was contended that, by leaving these seven poles in their original position, so that the workmen were required to work much closer to the high tension wires than they had been doing, a dangerous situation was created.

The power company's principal defense to this contention was that it had not moved the poles back for

the simple reason that the Louisiana Highway Department, for whose account W. R. Core Construction Company was doing the highway widening, did not ask that these particular poles be moved.

The plaintiffs also contended that, in addition to the initial and basic negligence of the power company in failing to move the seven poles back in the accident area, the power company was guilty of additional negligence in failing to give proper warnings to the workmen or to take safety precautions.

As noted below, substantial evidence was offered by the plaintiffs to show that the power company had considerable knowledge of the details of the entire project from the very outset. Substantial evidence was also offered to show that cranes and other "high rise" equipment were being used on the job almost continuously, long before the accident in question. Considerable testimony offered by plaintiffs also showed that numerous employees of the power company were in the construction area on numerous occasions prior to the accident and were bound to have known that cranes and other high rise equipment were being used. (R. 392, 393). Thus, the actual knowledge of such power company employees was offered to show notice to the company itself, in addition to the knowledge which the power company, as a matter of common sense and experience, should have had anyway from the nature of the work being undertaken.

Plaintiffs also offered testimony of Mr. Crockett, retired right of way man for the power company, as to a so-called "18 inch rule" which determined in a given case whether the moving back of poles along the

highway would be paid for by the power company or by the Highway Department. Mr. Crockett testified that if a pole was located more than 18 inches from the back slope of a ditch along a highway and had to be moved, the Highway Department would pay for relocating the pole whereas if a pole was less than 18 inches from the ditch, the power company would pay for the relocation. (R. 338).

Plaintiffs' electrical expert, Mr. James Todd, testified that the seven poles should have been moved back, like all of the others. (R. 567, 568). He also testified that, if they were not moved back, alternative safety measures should have been taken, including practical warnings to the workers on the highway project. (R. 564).

Over the vigorous and continuing objection of plaintiffs, the National Electrical Safety Code was admitted in evidence. (R. 691). Objection to the admission of this Code, made a basis of one assignment of error below, was predicated, not only upon the previous decision of the Fifth Circuit that this Code is never admissible in evidence itself, but also upon the basis that under the instant facts, it was completely irrelevant. This irrelevancy is shown by the fact that the power company's own expert, Mr. Segall, admitted that the Code contained no provisions whatever as to *horizontal clearances* of high tension wires along a highway (R. 693 and 711) and also admitted that said Code did not purport to cover minimum safety requirements *during construction situations*. (R. 716, 717).

The irrelevancy of the Code, in the instant case, was further shown by the admissions of Mr. James Todd,

plaintiffs' electrical expert, that insulation was not required on high tension lines paralleling a highway, that the Code did not require it and that, as a practical matter, insulation was no longer used in such situations. (R. 580). Moreover, Mr. Todd also testified, on cross-examination, that, as to vertical clearance, the power company's wires in the accident area fully complied with all requirements of the National Electrical Safety Code. (R. 582). Thus, since there was no pertinent contested issue as to which the National Electrical Safety Code could serve any useful purpose, its admission into evidence, could only tend to confuse the jury.

This appeal involves the second trial of this case, a jury having failed to agree in the first trial. The appeal to the Fifth Circuit Court of Appeals was prosecuted in forma pauperis. (R. 324).

W. R. Core Construction Company, the highway contractor, was brought in as a third party defendant by the defendant power company.

Despite the fact that the appeal in this case was vigorously presented and fully briefed with six seriously presented specifications of error, the Fifth Circuit Court of Appeal disposed of said appeal with the following one sentence opinion:

"No prejudicial error appearing in the trial of this diversity case, or of the judgment of the court entered upon the verdict of the jury, that judgment is affirmed."

For the purpose of this application we have confined ourselves to only three of these assigned errors which we believe are of sufficient national interest to warrant action by this Court.

REASONS FOR GRANTING THE WRIT

For the purposes of this application we have selected only three of the alleged errors assigned below, feeling that these matters are of sufficient national interest to warrant the grant of relief by way of certiorari. These errors are:

1. The error of admitting into evidence the National Electric Safety Code, despite the fact that it was irrelevant, and the instruction to the jury that they "might consider it", despite the fact that the admission of said Code in evidence had previously been outlawed by the Fifth Circuit in MISSISSIPPI POWER AND LIGHT CO. V. WHITESCARVER, 68 F. 2d 928;

2. The refusal of the Court to give a special charge as to the *non-delegable duty* of a power company to guard its high tension wires;

3. The refusal of the trial court to give a special charge as to the possibility of momentary distraction as bearing upon contributory negligence.

We submit that the first point, the admission of the National Electric Safety Code in evidence, particularly where it was so clearly irrelevant, is clearly of national interest. As pointed out by the Fifth Circuit in the Whitescarver case, supra, the said Code is not a law, either state or federal. As shown by numerous

reported decisions, however, power companies involved in electrical accidents consistently seek to get said Code before juries, by one device or another. To a jury of laymen, compliance with the Code is made to appear as compliance with the law. At best, this Code is merely a set of advisory rules as to *minimum requirements of safety*, and represents merely a compromise of opinions of many persons, not available for cross examination. A clear cut statement by this Court, therefore, is necessary to clarify the problem as to what extent this Code may be used, if at all. Otherwise juries in high tension accident cases will continue to have thrown in their laps for consideration a massive, complicated, technically written set of rules which can only confuse them as to the true duties of a power company or other party responsible to the public for maintenance of high tension lines.

Equally of national interest is the error as to refusal to give a proper charge as to the non-delegable nature of the duty of a power company quo ad maintenance of its high tension facilities so as to safeguard the public when it knows or should know of special dangers presented. There are numerous cases, discussed briefly below, at the State level and a few at the Federal Circuit Court of Appeal level, enunciating principles as to the high degree of care required of power companies, but there is a paucity of jurisprudence on this point at the national level.

Closely related to the above, though perhaps of lesser national interest, is the error of the Court in refusing to charge as to the possibility of momentary distractions as bearing upon contributory negligence. It is, however, a principle widely recognized in the

cases noted below and a clarification by this Court, will be of wide national interest, not only in electrical accident cases, but in all cases where contributory negligence is at issue.

None of the above problems were discussed or even listed by the Fifth Circuit in its one sentence opinion. We submit that the grant of certiorari in this case will not only do justice to the bereaved parents of the unfortunate deceased youth but that such action will also do justice to the jurisprudence, which the opinion of the Fifth Circuit has interred without benefit of clergy. Without any discussion whatever the Fifth Circuit has clearly overruled its own decision in MISSISSIPPI POWER AND LIGHT CO. V. WHITESCARVER, 68 F. 2d 928.

FIRST ERROR: THE ADMISSION IN EVIDENCE OF THE NATIONAL ELECTRICAL SAFETY CODE AND CONFUSING INSTRUCTIONS AS TO ITS EFFECT

At the outset of the testimony of the power company's electrical expert, Mr. Segall, plaintiffs' counsel made an objection to the offering in evidence of the National Electrical Safety Code. This objection was made in the form of a continuing objection (R. 691) and said objection was repeated at the conclusion of the testimony of said expert when the entire Code was offered in evidence. (R. 698).

In a leading case on this point the Fifth Circuit has held that this identical Code is not admissible in evidence. In *Mississippi Power & Light Co. v. Whitescarver*, 68 Fed. (2d) 928, the Fifth Circuit squarely held that

the National Electrical Safety Code was not admissible in evidence, stating: (p. 930 of 68 Fed. (2d), col. 2)

> "The book itself was offered as evidence in chief. It is conceded that the Bureau of Standards has no power to regulate the placing of electric wires, and that the book has no compulsive force. It was issued under permission of 15 USCA, Sec. 274, as 'Information which may be of value to the public.' No law required it. It represents merely the opinion of the compilers, and its preface states that as to many matters, there are conflicting views, and that especially many changes had been made in this edition touching line construction and that there would be future growth and development, and criticism is invited. It thus appears from the book itself what we should have known anyway, that it deals not with an exact science or mathematical or factual certainties, but with a controversial and developing science in which opinions may vary and experience work great changes. Books in such a field are like medical books rather than like almanacs, mathematical tables, approved histories, census compilations or weather reports. They are at last only the expert opinions of the authors, delivered not under oath nor subject to cross-examination, without opportunity to qualify or explain them, and really without certainty that the author still adheres to the opinions expressed when the book was written. The leading case in America for rejecting scientific books as primary evidence is *Ashworth v. Kittridge*, 12 Cush. (Mass.) 193, 59 Am. Dec. 178."

The error of the Court in admitting the entire Code in evidence was not only a clear-cut violation of the rule laid down by the Fifth Circuit in the *Whitescarver* case, *supra*, but, in addition the court instructed the jury that the Code *"is an element which you may consider."* (R. 763).

Just how or in what sense the jury might "consider" this Code as an "element" is indeed obscure. In view of the evidence adduced at the trial, the Code was altogether irrelevant because:

1. By the admissions of plaintiffs' own expert, (R. 580) as well as that of the power company's expert, (R. 693, 694) the Code did not require wires in this situation to be insulated;

2. By the admission of plaintiffs' own expert, (R. 582) as well as the power company's expert, (R. 695) the power company's wires complied with all Code requirements as to height or vertical clearances;

3. By the admissions of the power company's expert the Code made no provisions, one way or another, as to *horizontal clearances* in situations of this kind; (R. 693 and 711)

4. By the admissions of the power company's expert, the Code did not purport to cover all safety problems during construction work. (R. 717).

Finally, it should be noted that not only was the Code inadmissible in evidence, (under the square holding of this Court in *Whitescarver* case, *supra*) and not only

was it irrelevant anyway (because full compliance with the Code as to normal situations was admitted by both experts) BUT THE COURT ERRED FURTHER BY ADMITTING THE WHOLE CODE IN EVIDENCE (R. 698) AND DID NOT LIMIT IT TO ANY PARTICULAR SECTIONS.

Thus the entire Code was admitted into evidence as Defendant's Exhibit D-6 and this voluminous booklet with its complicated, technical provisions, was thrown into the jury's lap and they took it to the jury room during their deliberations. Moreover, as we noted above, they were told by the Court that they might "consider" the Code as an "element" in the case.

In his reasons for denying a new trial the Court failed to explain why he did not feel bound by the square holding of this Court in the *Whitescarver* case, *supra*. Instead the Court declared that the Code was "the Bible on this subject." (Vol. 1, R. 322). We respectfully submit that the Court has squarely held that the Code is not a "Bible" of any sort and it amounts to a sort of heresy to accept it as such.

Finally, we urge that the admission of the entire National Electrical Safety Code was highly prejudicial. There was no issue before the jury which the Code could help in any way to solve. The correctness of *vertical clearance* was conceded by plaintiffs and their electrical expert. No issue was made as to insulation. *Only horizontal clearance*, plus lack of warnings, was at issue, and as *to these issues the Code was silent.* The only practical effect of letting the jury take this confusing document into the jury room was to create

some vague idea that if the Company complied with the Code they were absolved from negligence.

The jury was not told how and to what purpose they might consider the Code. They were simply invited to speculate as to how it might, in some unspecified way, be pertinent.

SECOND ERROR: REFUSAL TO GIVE SPECIAL CHARGE AS TO NON-DELEGABLE NATURE OF POWER COMPANY'S DUTY TO EXERCISE HIGH DEGREE OF CARE

Plaintiffs' requested charge 4A (which appears among the exhibits and not in the bound record) reads as follows:

> "The duty of the power company to use a high degree of care towards the public continues at all times and may not be shifted or delegated to someone else. 29 *Corpus Juris Secundum* "Electricity" p. 574, sec. 38; *General Box Co. v. Missouri Utilities Co.*, 55 S.W. (2d) 442; *Grice v. Central Electric Power Ass'n.*, 92 S. (2d) 837, 69 A.L.R. (2d) 108."

Refusal of the Court to give the above charge was objected to by plaintiffs. (R. 773).

The refusal of the above charge, or anything remotely resembling it, was a crippling blow to the structure of plaintiffs' whole case. A major contention of plaintiffs was that the power company was guilty of initial negligence in failing to move back the seven poles in the construction area. This charge of negli-

gence was developed and emphasized long before trial, in a motion for production of documents filed on October 16, 1962. Moreover, from the outset, the power company had sought to shift responsibility for failure to move the said seven poles, by simply stating that the Highway Department had not requested that they be moved. Thus, on July 30, 1962 when the plaintiffs propounded to the power company interrogatory No. 6 (R. 68) as to why the said seven poles had not been moved back, the power company answered:

> "6. Not requested by the Highway Department." (R. 70).

This attempt by the power company to shift its own responsibility for the safe positioning of its poles called for a clear-cut instruction from the Court to the effect that the power company had, at all times, *an abiding, non-delegable duty toward the public*, which was not lessened by the fact that other parties might also have safety duties toward the public. As we will show, this is the law throughout the United States as well as in Louisiana. Moreover, wherever it is shown that a power company has knowledge of construction work being conducted in proximity to its high tension lines, it is uniformly held that the power company has its own separate and non-delegable duty to protect those necessarily brought into proximity to its high tension lines.

The Court, however, in refusing to give the requested charge, failed utterly to give any clear-cut instruction to the jury whereby they might even suspect that a power company could ever have any duties toward the public *which might be absolutely non-delegable and which could not be shifted merely because*

a third party, such as a contractor; had entered the picture. Instead, the Court gave the jury a loose collection of general observations which could serve little practical purpose in coming to grips with the real problem of liability.

Non-Delegable Nature of Power Company's Duty Toward Public Uniformity Recognized

It is universally held throughout the country that where a power company either has or should have knowledge of special dangers presented by reason of construction in proximity to its wires, the power company is under an abiding, non-delegable duty, which duty cannot be avoided by the fact that a contractor or other third party may also have special duties toward the public or toward workmen on the job. While we will not attempt an exhaustive review of all the law on this point, we submit the following examples of the application of this rule as set forth in leading cases from all jurisdictions:

PIKE V. CONSOLIDATED EDISON COMPANY OF NEW YORK, 99 N.E. 2d 885, BROWN V. BUFFALO GEN. ELECTRIC CO., 94 N.E. 2d 206, 34 L.R.A.N.S. 1089, CASUALTY CO. V. SWETT ELEC. LIGHT AND POWER CO., 129 N.E. 653, NICHOLSON V. GREELY SQUARE HOTEL CO. 125 N.E. 541; HOUSTON POWER AND LIGHT CO. V. BROOKS, 319 S. W. 2d 427, GENERAL BOX CO. V. MISSOURI UTILITIES CO., 55 S. W. 2d 442, AHEARN V. FLORIDA POWER AND LIGHT CO., 129 So.(2d) 457 (referring to an excellent annotation in 69 A.L.R. (2d) 93 involving electric accidents involving cranes)., BANKS V. CENTRAL HUDSON GAS AND ELECTRIC CORP. 224 F. 2d 631, KIMI-

KO TOMA V. UTAH POWER AND LIGHT CO., 365 Pac. 2d 788.

The fact that the high degree of care owed by a utility company quo ad its high tension wires is a non-delegable duty is flatly stated by Corpus Juris Secunlum, Vol. 29, Sec. 38, at page 574:

"The duty to exercise care is *a non-delegable duty imposed by law,* arising from the instrumentalities involved." (Emphasis added)

For a similar statement of the rule see RESTATEMENT OF THE LAW OF TORTS, Vol. 2, p. 1184, sec. 439.

In *Lisenby v. Tibbits*, 225 Fed. Supp. 870 (1963), a Federal District Court in Louisiana had occasion to review the *Louisiana jurisprudence* in situations of this kind. After discussing *Calton v. Louisiana Power & Light Co.*, 222 La. 1063, 64 S. (2d) 432 (1953) and *Thomas v. Gulf States Utilities Co.*, 128 S. (2d) 323 (1961), the Court declared: (at page 873 of 225 Fed. Supp.)

> "Here there remains a factual issue as to whether the power company reasonably should have foreseen that a single-wire high-voltage line might have been mistaken for a telephone line and whether, *considering the extensive drilling activities then taking place in the vicinity, additional precautions should have been taken.* For these reasons, the motion for summary judgment by Southwestern and Employers Mutual is denied." (Emphasis added).

On appeal the Fifth Circuit, with a panel consisting of Judges Hutcheson, Gewin and Hooper, affirmed in a per curiam opinion in which they "adopted" the "thoroughgoing opinion" of the District Court. See 327 Fed. (2d) 665.

Finally, we call attention to the excellent collection of cases in 69 A.L.R. (2d), page 104 et sequo, commencing with the heading "Foreseeability of dangers to others, generally," through page 110. These cases all show that the rule of the *Pike* case, discussed above is consistently recognized throughout the country and that where a utility company has or should have knowledge of special dangers presented by the presence of construction machinery in proximity to its wires, special duties arise which are *non-delegable*.

What The Court Charged Instead

The trial judge, in refusing this requested charge, 4A, relative to the non-delegable nature of a power company's duty toward the public, stated that he would cover this point, along with others included in special requests, in his general charge. (R. 751).

What the Court actually told the jury, however, not only failed to cover the vital aspect of non-delegability, but was actually erroneous and misleading. The nearest the Court came to touching upon the non-delegable duty of the power company was the following: (R. 762).

> "I charge that where the wires maintained by the company are designed to carry a strong and powerful current of electricity so that

> persons coming in contact with them are certain to be seriously injured, if not killed, the law imposes upon the company the duty of exercising the utmost care and prudence *consistent with the practical operation of its plant to prevent such injury.*" (Emphasis added).

The above portion of the charges does amount to a gesture in the right direction but it does not tell the jury in unequivocal terms that the duty of the power company is a non-delegable one nor does it even suggest, in practical understandable terms that *where construction is being carried on near the wires, the power company has an abiding duty to protect those necessarily brought into proximity to the high tension wires.*

COMPLETELY LACKING IS ANY INDICATION THAT, WHAT MIGHT BE DEEMED SUFFICIENT CARE IN NORMAL SITUATIONS WOULD NOT BE SUFFICIENT WHERE THE POWER COMPANY HAD KNOWLEDGE OF CONSTRUCTION GOING ON INVOLVING THE USE OF "HIGH RISE" MACHINERY IN PROXIMITY TO ITS WIRES.

The Court merely states a vague, general rule as to the high degree of care required, but then proceeds to render this vague and meaningless by addition of the emphasized language above, the "weasel words:" "*consistent with the practical operation of its plant* to prevent such injury."

To a jury, such language is calculated to convey the idea that the power company was indeed under a duty of taking special care to protect the public, *provided*

that this did not call for anything which would be inconvenient or burdensome. *This "business as usual" attitude is not the law.* When a power company has knowledge of construction work which brings machinery into proximity with its high tension wires, *it has a duty of its own,* to take whatever protective measures were appropriate, and this overriding duty is not qualified by any considerations of not interfering "with the practical operation of its plant."

Following the above quoted confusing instruction, the Court went on to state immediately thereafter: (R. 762)

> "The law is complied with when the company provides such a protection as will safely guard against any contingency that is reasonable to be anticipated. The company is not legally bound to safeguard against occurrences that cannot be reasonably expected or contemplated:
>
> "An electric utility company may be liable only for its negligence and is not an insurer of the safety of those who are injured by coming into contact with its electric lines."

Standing alone, the foregoing is correct, as far as it goes, *provided* that elsewhere the jury was told something about the *non-delegable, overriding duty of a power company which has notice of the threat of cranes or other "high rise" machinery in proximity to its wires.* But taken together with what went immediately before, the instruction is definitely lopsided because there is not even the faintest suggestion that a danger which

might not be "reasonably foreseeable" under normal circumstances *might well be foreseeable where construction was going on.*

Next, to add to the confusion the Court, after referring to "some discussion" of the safety rules of the National Electrical Safety Code, told the jury: (R. 763)

> "If you find that the Louisiana Power and Light Company complied with the standards recommended by the safety rules, *then you may find that there was no violation by the power company of the Code's safety standards.*"

WHAT, MAY WE ASK, DOES THAT STATEMENT MEAN? On its face, the statement seems utterly meaningless and calculated to confuse. Here the Court, in effect, says simply: "If you find that the power company complied with the safety standards of the Code then there was no violation of the Code." But, where does that leave us? Because, after uttering the above, the Court immediately goes on to compound the confusion by telling the jury: (R. 763)

> "You may, of course, consider the National Electrical Safety Code. *It was admitted in evidence. It is part of the evidence.* The Code is not the Law of Louisiana. It is not a Federal Law. The Code simply consists of minimum standards, and you have heard testimony in this trial as to the manner in which it is prepared and who takes part in its preparation, *so it is an element which you may consider.*" (Emphasis added).

Under a separate specification of error we have complained of the admission of the Code in evidence at all, as being in conflict with the leading decision of the Fifth Circuit on the subject, but here we point particularly to the confusing effect which the Court's language caused, taken together with what had been said just before. Here, after stating that the Code was not the law, either of Louisiana or of the United States, the Court states that it is nevertheless "in evidence" and advises the jury:

> "* * * so it is an *element* which you may *consider.*" (Emphasis added)

In what way should the jury "consider" this "element?"

The Court's final thrust on this point simply added to the abundance of confusion already created by the omelet of ambiguity served up above. He told the jury: (R. 764)

> "The power company has a duty to keep its *wires secured in a high enough place* to keep the premises safe for the usual and customary use, and for any use that is likely to occur there. It is not its duty to keep it safe from all uses, just for reasonably foreseeable uses." (Emphasis added).

In the words of Mark Antony, "this was the most unkindest cut of all." By the emphasized language the Court called attention to the requirement of *height* of wires alone, whereas nobody contended that they

were not high enough. *The plaintiffs own electrical expert admitted the wires were high enough.* (R. 582).

THE MAIN PROBLEM WAS AS TO WHETHER OR NOT THEY SHOULD HAVE BEEN MOVED FURTHER BACK FROM THE LINE OF CONSTRUCTION WORK AS THE OTHER POLES HAD BEEN.

Thus, not only did the trial Court refuse to give any suggestion that the duties of the power company were non-delegable, but he gave instead a thoroughly confusing charge and threw in a wholly meaningless comment on the effect of the National Electrical Safety Code. Reading the charge in its entirety, we submit, it was impossible for the jury to gather any clear idea that, if the power company knew or should have known of the construction work going on in proximity to its wires, it had a *non-delegable* duty of its own to take proper precautions, whatever the facts might indicate those precautions might be.

Nor can the failure to give the requested charge be excused on the assumption that there was no evidence to show notice by the power company of the use of cranes and other "high rise" equipment on this job. There was overwhelming evidence offered as to the use of such machinery for months preceding the accident, plus the fact that the power company had numerous employees in the area on various duties which was bound to have furnished due notice of the use of such machinery in proximity to the wires. (R. 571 through 578, R. 453, 454 and R. 653)

ERROR NUMBER THREE: REFUSAL TO GIVE SPECIAL CHARGE RELATIVE TO MOMENTARY

DISTRACTIONS AS BEARING UPON CONTRIBUTORY NEGLIGENCE

Plaintiff's requested charge 10A reads as follows:

> "10A. While it is true that contributory negligence may bar recovery of damages, I charge you that one who is obliged to act or work under dangerous circumstances, may, in a moment of forgetfulness, be excused from actions which would under other circumstances, be deemed careless. It is a question which you must decide, namely, whether or not the deceased boy was so distracted by some matter properly within his field of employment at the time of the accident so that his attention was momentarily diverted from the danger presented by the wires. *Crosby v. Brown Oil Tools*, 92 S. (2d) 115 (1957); *Black v. American Mutual Liability Ins. Co.*, 37 S. (2d) 63."

Refusal to give the above charge was specifically objected to by plaintiffs. (R. 773, 774).

The foregoing charge correctly states the law of Louisiana as well as the general rule throughout the country, as set forth in the cited authorities attached to said charge. We submit that there was no valid basis for the court's refusal to give this charge because the evidence showed ample possibility for application of the rule contended for by plaintiff.

The evidence showed beyond contradiction that the Soape boy was required to work *almost directly under the high tension wires*, (R. 416) along the sloping and

uneven shoulder of the highway. Moreover, he was required to attach a cable or steel line to a large stump by means of tongs and a clevis or "U" shaped device. (R. 386). Thus there was ample possibility, under these facts, that, preoccupied with watching his footing on this slanting, rough and uneven surface he might momentarily have been distracted from the dangers of the overhead wires or might even have slipped from some unexpected cause, thus bringing the cable line close to or in contact with the high tension wire.

CONCLUSION

In addition to the above three errors other serious errors were urged and briefed most thoroughly before the Fifth Circuit. We have not included all errors for the simple reason that this petition is already rather lengthy and the errors we have chosen here are of greater national interest.

We submit that; had the Fifth Circuit attempted to analyze and state, however briefly, its disposition of the assigned errors, the need for granting certiorari here would be more apparent. Instead of attempting to answer our argument, however, the appellate court simply by-passed it with the wholly unenlightening one sentence opinion quoted above.

While we appreciate the tremendous burden of litigation being borne by the able Judges of the Fifth Circuit, particularly by reason of the numerous civil rights cases, we strenuously urge that cases such as this, though not of headline caliber, deserve nevertheless more careful and detailed handling than was ac-

corded these poor parents. Their teen age son was killed by the gross negligence of the power company. They have not yet had a proper trial with proper instructions adequately informing the jury as to the high duties owed the public by a power company. We urge most earnestly that not only does justice to these bereaved parents call for the grant of certiorari here but also that the issues noted above call for clarification by this Court in areas of national interest.

WHEREFORE, the premises considered, petitioners pray that this Honorable Court grant certiorari.

Respectfully submitted.

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PROOF OF SERVICE

I, Edward B. Dufreche, attorney for petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for Writ of Certiorari on Monroe and Lemann, counsel for respondent, by mailing a copy thereof, postage prepaid, addressed to them at Whitney Building, New Orleans, Louisiana.

Dated this _____ day of September, 1966.

_____

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22,647

CHARLES ALVIN SOAPE and ESTHER GATLIN SOAPE,

Appellants,

versus

LOUISIANA POWER & LIGHT CO., ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 11, 1966.)

Before JONES and BELL, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM: No prejudicial error appearing in the trial of this diversity case, or in the judgment of the Court entered upon the verdict of the jury, that judgment is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22,647

D. C. Docket No. 7651-Civil Action

CHARLES ALVIN SOAPE and ESTHER GATLIN SOAPE,

Appellants,

versus

LOUISIANA POWER & LIGHT CO., ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JONES and BELL, Circuit Judges, and BREWSTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 11, 1966

Issued as Mandate: May 3, 1966.